Supreme Court, U.S.
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NO. 82-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES BARRETT and HARRY F. OLSON,
Petitioners,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF SOUTH CAROLINA

CHARLES W. BOYLE
1409 Peachtree Street, N.E.
Suite 100 South
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioners

PROFESSIONAL PRINTING SERVICES, INC.
8600-E Harford Road, Baltimore, MD 21234

QUESTION PRESENTED

1. Does the First Amendment to the United States Constitution allow the State of South Carolina to set community standards at a level of decency rather than at a level of tolerance in determining whether an item is patently offensive?

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NO. _____

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THE STATE OF SOUTH CAROLINA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and order of the Supreme Court of South Carolina in the above case filed on June 8, 1982.

OPINION BELOW

The opinion of the Supreme Court of South Carolina affirming the judgment of the Trial Court is not yet reported, but is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on June 8, 1982. This Petition for Writ of Certiorari is timely filed. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix B hereto.

STATEMENT OF THE CASE

The Petitioners, James Barrett and Harry F. Olson, were separately indicted and found guilty of a violation of Section 16-15-260, *et seq.*, Code of Laws of South Carolina (1976), as amended. The charges were predicated upon purchase of various press materials at the place of business where the Defendants were allegedly employed. Petitioners were tried by a jury. At the conclusion of the trial, the jury found the Petitioners guilty. They thereafter appealed their convictions to the Supreme Court of South Carolina in a consolidated appeal which affirmed the Trial Court judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASON FOR GRANTING WRIT

It is Repugnant to the First Amendment of the United States Constitution for a State to Set Community Standards at a Level of Decency Rather Than at a Level of Tolerance in Determining Whether Press Materials are Patently Offensive.

This issue especially merits review because the decision of the Supreme Court of South Carolina conflicts with the implicit teachings of this Court and the explicit teachings of the Fifth Circuit Court of Appeals in the case of *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir.) (1981). The Fifth Circuit in *Red Bluff* was examining a Texas statute which, as gleaned from the opinion, is identical to that of the South Carolina statute at least insofar as the Petitioner is complaining in this Petition. The Fifth Circuit found the issue of whether Texas had exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" to be a significant question. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d at 1029. The Fifth Circuit, however, abstained because of the pendency of ongoing state criminal proceedings in which that issue could have been resolved by narrowing jury instructions. The Fifth Circuit affirmed the District Court's abstention. The curative jury instructions which the Fifth Circuit alluded to in *Red Bluff* are absent from the jury instructions given in the Trial Court below in South Carolina.

Following the *Red Bluff, Id.* opinion of the Fifth Circuit, the State of Texas had occasion to rule on the identical question raised in this petition in the case of *Andrews v. Texas*, No. 01-81-0270-CR, Court of Appeals, First Supreme Judicial District, appeal filed May 6, 1982. In *Andrews*, the Texas Court of Appeals reversed the Trial Court which instructed the jury on the exact same definition of patently offensive as is found in the South Carolina statute complained of here. That is, because the statute's definition employed a standard of community *decency* rather than community tolerance. The Texas Court of Appeals ruled:

> "The word 'decency' is generally defined as propriety of conduct, speech, and behavior conforming to approved social standards. The word 'tolerance' is generally defined as the capacity for or practice of recognizing and respecting the opinions, practices, or behavior of others. The two words have very different connotations when used in terms of public opinion, as 'decency' refers to society's willing approval of behavior, and 'tolerance' to its reluctant acceptance of behavior. It has been held that a charge which instructs the jury to judge allegedly obscene material by standards of community decency, rather than of community tolerance, violates First Amendment guarantees of freedom of expression. *Smith v. U.S.*, 431 U.S. 291, 97 S.Ct. 1756 (1977). The court's charge in the case at bar improperly charged the jury that they might convict the appellant if they found the magazine in question was so offensive on its face as to affront current community standards of decency. This charge permitted the jury to evaluate the magazine not as an expression which the community regards as being less than decent. Thus, the court's definition was erroneous, and for the reasons previously stated, the court's charge constituted reversible error.

Red Bluff, supra.

The "tolerance" test is set forth in *Smith v. United States* 431 U.S. 291 at 305 (1977) where this Court, in the course of its discussion of prurient interest in patent offensiveness observes:

> "[C]ontemporary community standards must be applied by juries in accordance with their understanding of the *tolerance* of the average person in their community. . . ."

(Emphasis added.) In other cases, the word tolerant is used fluently. See, for example, *Miller v. California*, 413 U.S. 15 (1973):

> "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City. People

in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."

(Emphasis added.) 413 U.S. 13, 32.

In *Pinkus v. United States*, 432 U.S. 293 (1978), the Court has held...

"local standards rather than national standards should be applied. *Hamling v. U.S., supra*. Similarly, obscenity is to be judged according to the average person in the community rather than the most prudish or the most *tolerant*...."

(Emphasis added.) *Id.*, at 293.

And most recently, in the case of *New York v. Ferber*, _____ U.S. _____, 31 Criminal Law Reporter, 3139 at 3143, footnote 12:

"In addition, legal obscenity under *Miller* is a function of 'contemporary community standards.' 413 U.S. at 24. It is neither realistic nor constitutionally sound to read the First Amendment as requiring of the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas or New York City. *Id.*, at 32. It would be equally unrealistic to equate a community's *toleration* for sexually explicit material with the permissible scope of legislation aimed at protecting children from sexual exploitation."

(Emphasis supplied.)

Clearly, the multiple references by this Court in *Miller* and its progeny to the words "toierable", "tolerant", and "toleration" refer to a community standard of "tolerating" beliefs and behaviors of others within a community rather than a community finding the material to be distasteful to the community standards of decency. The Tennessee Supreme Court in *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738 (Tenn. 1979), interpreted the tolerance test set forth by *Miller* and its progeny in the following terms:

"It is obvious that the acceptance test would lead to the indiscriminate branding as obscene much of protected speech that would otherwise pass the tolerance test. As we have heretofore noted, we cannot encroach further

upon the freedom of speech and press and the *Miller* standards permit, as a matter of federal constitutional law."

582 S.W.2d 738, 748.

Contrary to the Supreme Court of South Carolina's ruling, Section 16-15-260 is unconstitutional. The full text of Section 16-15-260 reads as follows:

Definitions.

As used in Sections 16-15-270 through 16-15-440:

(a) "Obscene or obscenity" means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational or scientific value. In order for any matter to be determined "obscene" the trier of fact must find:

(1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and

(2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and

(3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(b) "Prurient Interest" means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(c) "Patently Offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

The issue raised in the Supreme Court of South Carolina is as follows:

Section 16-15-260 of the South Carolina Code is unconstitutional on its face and/or as applied to the

> Petitioner herein and is violative of his First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution and under the applicable corollary to the South Carolina Constitution.

The Supreme Court of South Carolina did not address the substance of the complaint to the constitutionality of the statute, rather they chose to say that counsel for the Petitioners "picketh the nit." They went on to say that although the materials were not before them for examination, there is no doubt that they were obscene because of what was printed in the record. This summary answer to the complaints of Petitioners should not be allowed to remain the law of the State of South Carolina. This would significantly encroach upon the First Amendment rights of the citizens of South Carolina because a citizen could be convicted of disseminating material which displeases a community's standards of decency and propriety within the community rather than a community's sense of tolerance of what other adults in the community can see and read.

It is clear from the teachings of this Court, the Fifth Circuit Court of Appeals, the Tennessee Supreme Court and the Texas Court of Appeals that the patently offensive definition in the South Carolina law is a subtle but significant change in the constitutional dimensions allowed by the *Miller* decision. It is, therefore, apparent that this deviation in the law of community standards unconstitutionally infringes upon the rights secured Petitioners by the Constitution of the United States.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment by the Supreme Court of South Carolina.

Respectfully submitted,

CHARLES W. BOYLE
1409 Peachtree Street, N.E.
Suite 100 South
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioners